Supreme Court, U. S.
FILED
JUL 28 1976
MICHAEL RODAK, JR., CLERK

No. 75-1533

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARGARET CANADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 16a-25a) is reported at 527 F. 2d 1374.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1975, and a petition for rehearing with suggestion of rehearing *en banc* (Pet. App. 26a) was denied on February 25, 1976. On March 8, 1976, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to April 23, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of a suitcase that had been presented voluntarily to an airport security guard was lawful.

2. Whether petitioner's Fourth Amendment rights were violated when the manager of a motel informed government agents of the long-distance telephone numbers to which calls had been placed from petitioner's room.

3. Whether the search of an automobile and its contents was lawful.

4. Whether the district court erred in refusing to permit an unidentified person to post bail for petitioner.

5. Whether a juror's acquaintance with a police officer who was not called as a witness deprived petitioner of a fair trial.

6. Whether the district court's questioning of a witness deprived petitioner of a fair trial.

7. Whether petitioner's sentence was based on an improper factor.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to possess heroin and cocaine and of possessing heroin and cocaine with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) and 846. She was sentenced to concurrent terms of five years' imprisonment on each count, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and to a 15-year term of special parole. The court of appeals affirmed (Pet. App. 16a-25a).

The undisputed facts are set forth in the opinion of the court of appeals (Pet. App. 17a-19a). Briefly, they show that on February 16, 1975, petitioner and a male companion, who was carrying a suitcase, approached a baggage x-ray machine at the Detroit Metropolitan Airport. The male handed the suitcase to an airline security guard, who placed it onto a conveyor belt

that led to the x-ray machine (Tr. 213). Because half of the suitcase was opaque to x-rays, the security guard asked if she could open it for a visual inspection. Petitioner's companion asked why further inspection was necessary, and the guard explained that the x-ray examination had not been fully successful. Hearing no objection from either petitioner or her companion, the guard opened the suitcase and observed one article of clothing and a paper bag containing stacks of $20 and $50 bills, with the figure "$68,000" written on the outside of the bag. After the guard closed the suitcase and returned it to petitioner's companion, she heard him tell petitioner, "Don't worry about it; it's okay" (Pet. App. 17a).

The security guard informed an agent of the Drug Enforcement Administration that she had seen an unusually large amount of cash in a suitcase and that petitioner had checked the suitcase and boarded an airplane for San Diego. Further investigation by the D.E.A. agent revealed that petitioner's male companion, who had not gone aboard the airplane, was a known narcotics violator and was the son of two other well-known drug traffickers in Detroit (Tr. 26). The agent transmitted this information to D.E.A. personnel in San Diego, who set up surveillance at the San Diego International Airport in anticipation of petitioner's arrival (Pet. App. 18a).

Petitioner was met at the airport in San Diego by Clarence Turner, with whom she walked in circuitous fashion to a waiting automobile being driven by Anne Welsh.[1] The three then proceeded to a motel in Welsh's

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[1]After a separate non-jury trial, Welsh and Turner also were convicted of conspiracy and substantive counts relating to these events. Welsh was sentenced to three years' imprisonment and Turner to five years' imprisonment, both sentences to be followed

rented car (Tr. 61-62), driving in a manner calculated to elude any persons following them (Tr. 50-57). When they arrived at the motel, petitioner and Turner registered under an alias in one room, while Welsh took another room. That evening, three long-distance calls to Detroit were placed by either petitioner or Turner, one of which went to a telephone number used by known narcotics violators associated with the man who had accompanied petitioner to the airport in Detroit (Pet. App. 18a).

On the following morning, Turner and Welsh placed an empty duffel bag in the car and drove to Mexico. When they returned to the motel about five hours later, objects were clearly discernible in the bottom of the duffel bag. Within minutes of the arrival of Welsh and Turner at the motel, the duffel bag and suitcase were hurriedly placed in the trunk of the car, and petitioner and the others drove onto the highway at a high rate of speed (Tr. 70-73). On the highway, surveilling agents stopped the vehicle and asked Welsh, the lessee of the car, whether she would object to a search of the automobile and its contents for narcotics or contraband. Welsh replied, "No, go ahead" (Tr. 75-76). An agent then opened the trunk, searched the suitcase, and found four pounds of heroin and one pound of cocaine, having a total value of about $64,000 (Tr. 322-324, 337-338; Pet. App. 19a).

ARGUMENT

1. Petitioner contends (Pet. 7-12) that the airport security search of the suitcase carried by her male companion was unlawful. After a detailed consideration of the evidence, however, the court of appeals found

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by ten-year terms of special parole. The court of appeals affirmed the convictions in an unpublished memorandum opinion. *United States* v. *Welsh*, Nos. 75-3000 and 75-3001, decided May 25, 1976.

that consent to the search had been given (Pet. App. 19a-23a). This factual determination is correct, since petitioner's confederate—who exercised control over the suitcase at all relevant times—voluntarily produced it for inspection and did not object to the guard's request for permission to open the bag after she had explained the necessity for that action. See *United States* v. *Matlock*, 415 U.S. 164, 171 and n. 7; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227; *Frazier* v. *Cupp*, 394 U.S. 731, 740; *United States* v. *Fields*, 458 F. 2d 1194, 1198 (C.A. 3), certiorari denied, 412 U.S. 927. Indeed, neither petitioner nor her companion voiced any contemporaneous objection to the guard's inspection of the suitcase.[2]

2. Petitioner claims (Pet. 12-14) that her Fourth Amendment privacy interests were violated when the motel manager informed D.E.A. agents of the Detroit telephone numbers called by petitioner and Turner from their room in the motel. But petitioner or her roommate voluntarily gave this information to the manager, who obviously was required to record the numbers to ensure that proper payment for the long-distance calls was made. Petitioner had no reasonable expectation that the manager would not divulge this information to law enforcement officers and has no standing to complain a-

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[2]Each of the cases cited by the petitioner (Pet. 8-9) as being in conflict with the decision below is distinguishable on its facts. Moreover, although petitioner alleges that the security guard's search was somehow tainted by her practice of notifying D.E.A. agents of suspicious circumstances and by the fact that she occasionally was compensated for this information, the only effect of her cooperation would be arguably to transform an otherwise private search into a governmental one. Here, however, the court of appeals assumed that the guard's search constituted government action (Pet. App. 20a), and it analyzed the search under Fourth Amendment principles.

bout his actions in doing so. See *United States* v. *Miller,* No. 74-1179, decided April 21, 1976, slip op. 6-8.

3. Petitioner's challenge (Pet. 15-18) to the legality of the D.E.A. agents' search of the car and its contents, which led to the discovery of narcotics in the suitcase, is insubstantial. Although petitioner contends that Welsh's consent to the search was ineffective, the evidence showed that the car was leased by Welsh and that the suitcase was jointly controlled by all members of the conspiracy. Indeed, throughout the period of this two-day drug transaction, petitioner had been in custody of the suitcase only for short periods of time. Thus, Welsh's consent to the search was binding on petitioner. *United States* v. *Matlock, supra; Frazier* v. *Cupp, supra.*

Moreover, as the court of appeals held (Pet. App. 23a-25a), the search and subsequent arrest also were proper because the agents had probable cause to believe that the suspects were transporting narcotics. See *Texas* v. *White,* 423 U.S. 67; *Chambers* v. *Maroney,* 399 U.S. 42. Although petitioner argues that a warrant could have been obtained earlier in the day, the agents' failure to do so did not render the warrantless arrests invalid. *United States* v. *Watson,* 423 U.S. 411, 417.

4. Petitioner's contention (Pet. 19-20) that the district court improperly refused to permit unidentified persons to post $60,000 to secure her pretrial release is moot, since petitioner has been convicted and does not specify how the pretrial imprisonment prejudiced her at trial. In any event, the trial judge's actions were wholly justified, as his explicit statement of reasons indicates (Pet. App. 5a-6a):

> I want to know who is putting up the money from one standpoint: to find out what motive [petitioner will] have to come back to court if she's allowed out on bond. I'm interested in finding out whether, whoever this mysterious person is who's putting up $60,000 of his or her cash money, whether they have a motive to keep [petitioner] from coming back to court * * * .
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> * * * * *
>
> Now, I can easily see * * * that somebody apparently back in Detroit could have a very strong desire to see that she never comes back into this court or any other court, with very strong reasons for that feeling.

Since the purpose of pretrial release on bail is to "assure the appearance of the [defendant] as required," 18 U.S.C. 3146, the court correctly considered whether the person posting bail for petitioner may have had an ulterior motive. There is absolutely nothing in the record to support petitioner's suggestion (Pet. 20) that the court wished to confine petitioner prior to trial in order to force her to cooperate in the government's investigation.

5. Petitioner contends (Pet. 22-23) that the district court "smudged the appearance of justice" by refusing to allow inquiry of a juror who was familiar with a scheduled government witness. During trial, the prosecutor informed the judge and defense counsel that one of his intended witnesses, Agent Gordon Redding of the San Diego police department, had seen the jurors leave the courtroom for a recess and had recognized one of them as a person with whom he had previously been acquainted as a police officer (Pet. App. 11a). Defense counsel asked the prosecutor several clarifying questions (Pet. App. 11a-12a) but, contrary to petitioner's assertion (Pet. 22), did not ask to interrogate the juror, and the trial resumed. Because of the potential problem, however, the government decided not to call Agent Redding as a witness, and the police officer did not testify at trial.

There is no support for petitioner's assertion that this incident deprived her of a fair trial. Contrary to petitioner's allegation (Pet. 22), Agent Redding's name was not read to the prospective jurors as a potential witness, his name was not mentioned in the government's opening statement (although the name "Redding" was mentioned in passing by some of the witnesses), and Agent Redding was not even in the courtroom during trial.[3] Thus, it is exceedingly unlikely that the juror could have been improperly influenced by any prior acquaintance with Redding.

6. Petitioner contends (Pet. 21) that she was prejudiced by the district court's questioning of a witness at trial. A review of the colloquy to which petitioner objects (Pet. App. 8a-9a), however, indicates that the court's inquiry was relevant to the issues under consideration and was a legitimate attempt to expedite the trial. Not only did petitioner's counsel not object to the court's question at the time, but he followed the question by saying, "Well, let's get into that aspect" (Tr. 225).[4]

7. Finally, petitioner's claim (Pet. 23) that the district court refused to impose a lenient sentence because she would not cooperate with the government is based upon a misreading of the court's comments at sentencing. The court said (Tr. 419):

> I have the feeling that the only reason [petitioner] hasn't cooperated with the government is personal fear which I suspect in this instance is well-founded. Therefore, I'm going to sentence her on the basis that, because of that fear, she's not going to

[3]Because he was an intended witness, Agent Redding had been sequestered until this incident occurred.

[4]Petitioner later moved for a mistrial based on the trial judge's question (Pet. App. 10a-11a).

> cooperate with the government. If I thought I could get her cooperation by giving her thirty years, I'd give her thirty years, but I'm not going to do that, but I think the recommendation of the probation office is a completely proper one under the circumstances.

This statement clearly indicates that the trial judge understood why petitioner would not cooperate with the government and that he did not consider this factor to enhance the sentence. Indeed, the court explicitly stated that he would accept the recommendation of the probation office.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1976.

DOJ-1976-07